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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**ALFRED WINDHOLZ, individually, and)  
for the benefit of Judy A. Windholz, )  
his wife, )**

**Plaintiff, )**

**vs. )**

**Case No. 01-1066-JAR**

**HBE CORPORATION, )  
a foreign corporation, )**

**Defendant. )**

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**MEMORANDUM AND ORDER DENYING MOTION FOR NEW TRIAL**

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Plaintiff brought this negligence action, alleging personal injuries as a result of a fire at Hays Medical Center. On January 10, 2003, the jury returned a verdict allocating 100% of the fault to Plaintiff's employer, Hays Medical Center, who was not a party to this action. This is before the Court on Plaintiff's Motion for a New Trial (Doc. 108). Plaintiff moves the Court for a new trial pursuant to Fed. R. Civ. P. 59(a)(1), arguing that the jury's verdict is contrary to the clear weight of the evidence because it (1) assessed 100% fault on the absent third party despite clear evidence of Defendant's fault and (2) failed to award past noneconomic losses and a portion of the past medical expenses while awarding substantial future noneconomic losses and future medical expenses.

Plaintiff moves the Court for a new trial pursuant to Fed. R. Civ. P. 59(a)(1),<sup>1</sup> arguing that

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<sup>1</sup>Rule 59(a)(1) provides in pertinent part that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1).

the jury's verdict is contrary to the clear weight of the evidence. A motion for a new trial based on the ground that the verdict is against the weight of the evidence presents a question of fact, not law, and is committed to the trial court's discretion.<sup>2</sup> This discretionary power should only be invoked in the exceptional case where the verdict is "clearly, decidedly, or overwhelmingly against the weight of the evidence."<sup>3</sup> "A new trial is not warranted simply because the court would have reached a different verdict."<sup>4</sup>

Plaintiff argues that in ruling on motions for a new trial, courts have been improperly viewing the evidence in the light most favorable to the nonmoving party. The Court agrees, and adopts the reasoning set forth in *Rivera v. Rivera*.<sup>5</sup> In *Rivera*, United States Magistrate Judge O'Hara found in pertinent part as follows:

A number of cases in this district have commented that the court must view the evidence in the light most favorable to the nonmoving party. However, the Tenth Circuit cases that purportedly provide authority to support these statement . . . do not actually support this proposition. . . . The undersigned magistrate judge has not located any precedent that provides well-reasoned support for the proposition that the court must view the evidence in the light most favorable to the prevailing party when ruling on a motion for a new trial. It appears that this proposition has been perpetuated by the fact that courts commonly consider motions for new trials along with motions for judgment as a matter of law, but fail to distinguish the unique standards applicable to each.

By comparison, a number of other cases in this district have held that the court may weigh the evidence for itself and assess the credibility of the witnesses when ruling on a motion for a new trial. This standard is consistent with the overwhelming weight of modern authority. This standard also provides a

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<sup>2</sup>*Patton v. TIC United Corp.*, 77 F.3d 1235, 1242 (10<sup>th</sup> Cir. 1996), *cert. denied* 518 U.S. 1005 (1996); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616 (10<sup>th</sup> Cir. 1984).

<sup>3</sup>*Patton*, 77 F.3d at 1242 (citing *Brown*, 736 F.2d at 616-17).

<sup>4</sup>*Hillman v. United States Postal Serv.*, 169 F. Supp. 2d 1218, 1222 (D. Kan. 2001) (quotation omitted).

<sup>5</sup>262 F. Supp. 2d 1217, 2003 WL 21068357 (D. Kan. May 13, 2003).

meaningful distinction between motions for judgment as a matter of law (*i.e.*, notwithstanding a verdict) and motions for a new trial, *i.e.*, the former directs a judgment in favor of a party whereas the latter affords a lesser remedy.

In sum, in light of the lack of clear, well-reasoned authority on this issue in the Tenth Circuit and in this district compared to the overwhelming weight of modern authority in other circuits, as well as the fact that it should be more difficult to obtain an order granting a motion for judgment as a matter of law than it is to obtain an order granting a motion for a new trial, the court is persuaded that, in ruling on a motion for a new trial, it may reweigh the evidence and assess the credibility of witnesses. Of course, in doing so, the court still must be mindful that it may not usurp the jury's function simply because the court would have reached a different result than the jury. Rather, as the Tenth Circuit has instructed, the court must invoke its discretionary power only in an exceptional case where the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence.<sup>6</sup> (Footnotes omitted)

In this case, the jury found that Plaintiff's employer, Hays Medical Center, was 100% at fault. Plaintiff argues that it was against the clear weight of the evidence for the jury not to find Defendant at fault. Plaintiff points out that Defendant started the fire, and that Defendant's employees testified to four different versions of what happened.

However, the Court cannot say that the verdict was "clearly, decidedly, or overwhelmingly against the weight of the evidence." Defendant alleged that Hays Medical Center failed to inform Defendant that Hays Medical Center had penetrated a firewall by installing telephone conduit. Prior to trial, this Court granted Defendant's motion for summary judgment, ruling that Hays Medical Center had a contractual duty to inform Defendant of any penetration it made to any firewalls, and that Hays Medical Center breached that duty by failing to inform Defendant that Hays Medical Center penetrated a firewall to install communication conduit and wiring.<sup>7</sup> The Court instructed the jury as to these findings. Instruction No. 9

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<sup>6</sup>*Id.* at \*9 - \*11.

<sup>7</sup>Memorandum and Order Partially Granting Summary Judgment (Doc. 54).

provided that:

It is uncontroverted that Hays Medical Center had a contractual duty to inform HBE of any penetrations it made to any firewalls. It is uncontroverted that Hays Medical Center breached that duty by failing to inform HBE that Hays Medical Center penetrated a firewall. Since this is uncontroverted, you may accept this as true.

Plaintiff argued that Defendant was aware of the penetration of the firewall because the conduit was visible from the new equipment room. However, there was testimony that the conduit was not visible.<sup>8</sup> The Director of Facilities Management for Hays Medical Center also testified that he thought the fire occurred “simultaneously” to the time Hays Medical Center began to use the new telephone room, and that the fire “expedited” the switch from the old telephone room to the new telephone room.<sup>9</sup> The jury could have reasonably concluded that the fire occurred during the interim between the time Hays Medical Center penetrated the 12-inch concrete wall but before Hays Medical Center penetrated the sheetrock wall in the new telephone room. The verdict was not “clearly, decidedly or overwhelmingly against the weight of the evidence.” “A new trial is not warranted simply because the court would have reached a different verdict.”<sup>10</sup>

Plaintiff also claims that because the jury failed to award past non-economic losses and only a portion of the past medical expenses, the verdict was contrary to the evidence and he is entitled to a new trial. Even if the damage award was contrary to the evidence, Plaintiff would

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<sup>8</sup>See April 4, 2002 Deposition of Cecil A. Johnson, p. 42 line 9 through p. 43 line 13, and p. 55 line 21, read into the record on January 7, 2003.

<sup>9</sup>April 2, 2002 Oral Deposition of Larry Surmeier, p. 21, lines 4 through 12, read into the record on January 9, 2003.

<sup>10</sup>*Hillman v. United States Postal Serv.*, 169 F. Supp. 2d 1218, 1222 (D. Kan. 2001) (quotation omitted).

only be entitled to a new trial on the issue of damages. The Court can limit a new trial to the issue of damages, unless: 1) there is an error or insupportable damages award that calls into question the propriety of the original jury's finding of liability (i.e. a compromise verdict where suspiciously low damages are awarded in a case of closely contested liability); or 2) the two issues are inextricably intertwined such that it would cause confusion and uncertainty if only one were retried.<sup>11</sup> Neither situation applies in this case.<sup>12</sup> Because the jury found Defendant to be 0% at fault, any retrial solely on the issue of damages would be moot.

**IT IS THEREFORE ORDERED BY THE COURT** that Plaintiff's Motion for a New Trial (Doc. 108) shall be DENIED.

IT IS SO ORDERED.

Dated this 29<sup>th</sup> day of August, 2003.

**S/ Julie A. Robinson**  
**JULIE A. ROBINSON**  
**UNITED STATES DISTRICT JUDGE**

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<sup>11</sup>*Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1255-56 (10<sup>th</sup> Cir. 1999) (citations omitted).

<sup>12</sup>*See Fitzpatrick v. Allen*, 24 Kan. App. 2d 896, 908, 955 P.2d 141, 150 (Kan. App. 1998) ("It is incongruous to expect the jury compromised on liability and damages when it awarded limited damages and [found the defendant] 0% at fault"); *Putter v. Bowman*, 7 Kan. App. 2d 323, 328, 641 P.2d 411, 416 (1982) (finding that where the jury was instructed to fix damages without considering the percentage of fault of the parties and the jury's finding of fault was supported by the record, the court could not say that inadequate damages were awarded as a compromise on the issue of liability).